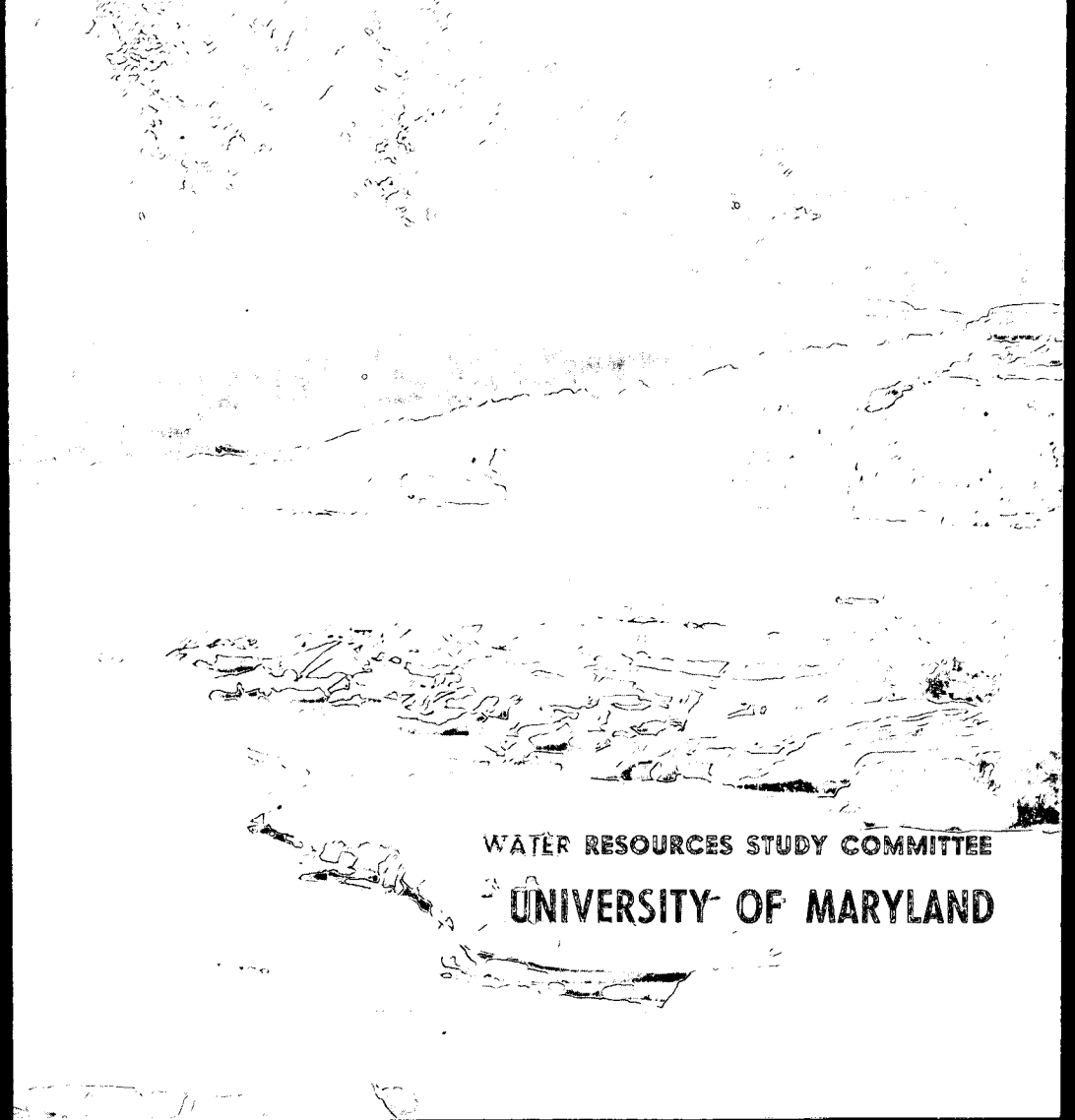
SELECTED OPINIONS

OF THE

ATTORNEY GENERAL OF MARYLAND

PERTAINING TO

WATER RESOURCES MANAGEMENT



WATER RESOURCES STUDY COMMITTEE

UNIVERSITY OF MARYLAND

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Compiled by

Paul M. Galbreath

Prepared for

THE WATER RESOURCES STUDY COMMITTEE

UNIVERSITY OF MARYLAND

COLLEGE PARK, MARYLAND

December, 1966

WATER RESOURCES STUDY COMMITTEE

UNIVERSITY OF MARYLAND

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WATER RESOURCES STUDY COMMITTEE

UNIVERSITY OF MARYLAND

December 15, 1966

Mr. Paul W. McKee, Director
Maryland Department of Water Resources
State Office Building
Annapolis, Maryland

Dear Mr. McKee:

Selected opinions of the Attorney General of Maryland pertaining to Water Resources Management follow. The Study Committee believes these opinions to be those of importance to the Department of Water Resources and are published as an appendix to the Committee's final report, "Water Resources Management in Maryland."

Yours truly,

R. L. Green
Chairman

FOREWORD

The opinions of the Attorney General of Maryland included in this material are those considered to be of most concern to the Department of Water Resources. Numerous other opinions that apply to other State agencies with responsibilities relative to the State's natural resources are to be found in the published reports.

These opinions are based upon the Maryland law as it existed at the time these rulings were made. With very few exceptions these opinions are as applicable today as at the time they were rendered.

In a few instances the entire opinion is not included, but brief comments are given along with the citation as to where the complete opinion may be found in the published reports of the Attorney General.

Where the opinion begins with "Letter to . . ." the material which follows was obtained from a letter in the files of the respective department and does not at this time appear in the published reports of the Attorney General.

P. M. G.

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SELECTED OPINIONS OF THE ATTORNEY GENERAL

OF MARYLAND

Volume 22, Page 348

July 2, 1937

Brief Comment

The State Board of Health has jurisdiction to abate a nuisance resulting from uncovered crab pickings.

Article 43, Section 3, gives the Board authority to investigate "all nuisances affecting the public health." It also has authority to make rules and regulations for the proper disposal of waste material in which class the uncovered crab pickings would fall. The Board, if upon investigation, decides that such waste creates a nuisance, or a health menace, may order abatement of the nuisance or may obtain an injunction directing the same. It could prohibit such acts by rules and regulations, and such rules may carry a penalty up to $100.00 for their violation.

Volume 22, Page 224

September 14, 1937

Brief Comment

The President and the Manager of a corporation who ordered the dumping of certain poisonous substances into a stream killing fish therein may be indicted, either individually or together with all persons in any way responsible for the unlawful act.

Volume 23, Page 360

February 21, 1938

Dr. Robert H. Riley, Director
State Department of Health

In your letter of February 15, 1938, addressed to this office, you ask for an opinion relative to what authority, if any, the Department of Health has over boats tied up to wharves in navigable waters; and you further state that you are particularly interested in boats on which people are living and from which sewage is being discharged into the water.

The Police Power of the State is supreme in all matters relating to public health, public morals and public safety, so the question arises as to whether or not this fundamental power of the State is delegated to your Department.

Powers granted to the State Board of Health under Section 3, Article 43, of the Annotated Code of Maryland, 1924 Edition, are exceedingly broad. Briefly, they are as follows:

> The State Board of Health shall have the general care of the sanitary interests of the people of this State; they shall make sanitary investigations and inquiries respecting the causes of disease, and especially epidemics, the cause of mortality and the influence of localities, employment, habits and other circumstances and conditions upon the health of the people; they shall inquire into and investigate all nuisances affecting the public health and are authorized and empowered by information or petition filed in the name of the Board to any judge of the circuit court for the county in which a nuisance may exist, or to the judge of the circuit court for Baltimore City, as the case may be,....for an injunction to restrain and prevent such nuisance, no matter by whom or by what authority committed; they shall have the power to enter upon and inspect private property in regard to the presence of a nuisance, causes of infectious and contagious diseases, and to determine the cause and source of diseases; to make rules and regulations not inconsistent with law regulating the character and location of plumbing, drainage, water supply, disposal of sewerage, garbage or other waste material or offensive trades....

Under Section 34, the following language appears:

> It shall be the duty of the State Board of Health to take such action and adopt and enforce such rules and regulations as may be necessary to prevent the introduction of any infectious or contagious disease into this State, or to prevent the spread of any infectious or contagious disease whether or not such disease shall exist within this State at the time of the passage of this Act, and any person or persons or corporations refusing or neglecting to obey such rules and regulations, after due notice thereof, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars for every such offense.

In addition to the broad powers herein above set forth, and the penalty attached thereto for violating same, under Section 339 of Article 43, the Board of Health is apparently specifically empowered to do certain acts which seem to apply to the question propounded in your letter:

> Whenever the State Board of Health shall find that the water or ice from any public or private source of water or ice supply is or is likely to become dangerous to health, or that the discharge of sewerage or the method of disposal of sewerage or refuse from any system or plant, public or private, is or is likely to become prejudicial to health or comfort, it shall order that such source of water or ice supply shall be closed or said point of sewerage discharge or method of disposal of sewerage or refuse abandoned; or the Board may order that such works or devices shall be installed or such measures instituted as shall be sufficient to remedy existing conditions, if in its judgment such conditions can be remedied in a practical manner by such works, devices or measures....

Finally, with specific regard to ships tied to docks in navigable waters, I shall refer you to Section 160 of Article 75:

> Every county lying on any navigable river in this State shall extend its jurisdiction from the shore to the channel of the river that divides the counties, except where a dividing line has been fixed in such river by law and where any ship or other vessel shall be in said river, process may be served on board the

said ship or vessel by the officers of either county that can first serve it, but if she is moored or fastened to the land on either side of said river, then she shall be considered as in the county to whose shore she is fastened.

In view of the above, it is the opinion of this office that the State Board of Health has authority to proceed against ships tied up at wharves in navigable waters for the purpose of dictating what their method of sewage disposal should be.

Herbert R. O'Conner, Attorney General

Volume 24, Page 386

August 11, 1939

Brief Comment

Although the State Board of Health has authority to direct a municipality and certain other units to install or improve water systems and upon the issuance of such an order a municipality or other unit is required to carry out its terms, the authority under Article 43 of the Code does not authorize the State Board of Health to direct the installation of water meters. The City of Frostburg requested the State Board of Health to issue an order and permit for the issuance of $35,000 worth of bonds, the proceeds of the bond issue to be used to purchase water meters. The State Board of Health does not have authority to order the installation of the water meters.

Volume 24, Page 1060

January 4, 1939

Mr. Abel Wolman, Chairman
Water Resources Commission

In your letter of December 24th, you state that your commission has prepared certain regulations governing its future operation and has tentatively fixed a nominal filing fee to accompany each application to the commission for permits in connection with water use and has also established, tentatively, an annual charge to be assessed against future power plants based upon the installed capacity. You state that a question has been raised as to the authority of the commission to establish such fees and charges, and ask my opinion on this point.

The Water Resources Commission was created by Chapter 526 of the Acts of 1933. (Sections 1-17 of Article 96B of the Code.) It was given wide powers of regulation and control, and, in Section 11, the power "to make such rules and regulations, and issue such orders as may be proper for affecting the purpose of this Article." I find no suggestion, however, that the commission should collect any fees and charges. On the contrary, there is a provision that its expenses should be provided in the budget from general revenues of the State (Section 2). Under these circumstances, I am of the opinion that the commission lacks the power to make any charges in the absence of specific authorization in the statute. If such a power is deemed to be desirable or essential, I would suggest that an ammendment to the law be proposed at the approaching session of the Legislature.

William C. Walsh, Attorney General
Wm. L. Henderson, Deputy Attorney General

Volume 30, Page 49

May 10, 1945

Brief Comment

The Department of Geology, Mines and Water Resources has no jurisdiction over storage standpipes of the Washington Suburban Sanitary Commission. The Legislature intended to limit the jurisdiction of the Department to water works in or adjacent to the bed of a stream. For this reason, once the appropriation of the water has been approved by the Department, it is no concern of this agency as to how the standpipes for water storage are constructed. Questions of design, structural strength or safety are committed by law to agencies other than the Department of Geology, Mines and Water Resources.

Volume 32, Page 514

November 21, 1947

Mr. Paul W. McKee, Executive Secretary
Water Pollution Control Commission

In your letter of November 6th, you put the following question:

> Does the Maryland Water Pollution Control Commission have the power under Chapter 697, Acts of 1947, to demand that all persons submit plans for treatment facilities to the Commission for their approval before any discharge can be made into the waters of the State?

Your question is so broadly stated that the answer must be in the negative. Nowhere in Chapter 697 is such broad authority given to the Commission. Section 33 does provide, in part, as follows:

> Every person the Commission has reason to believe is causing or is about to be causing pollution shall furnish the Commission all pertinent information required by it in the discharge of its duties under this subtitle.

Under this portion of the law, the pertinent information which the Commission may require would include plans for treatment facilities if the erection or enlargement of some plant or industry leads the Commission to reasonably believe that pollution will be caused by the plant or its operation. In other words, the Commission cannot automatically require submission of plans, but may do so only when facts or knowledge lead it to believe that pollution results or is about to result from the operation, actual or potential, of some undertaking.

Hall Hammond, Attorney General
Joseph D. Buscher, Asst. Attorney General

Volume 33, Page 421

January 14, 1948

Brief Comment

The owner of a water well must obtain a permit from the Department of Geology, Mines and Water Resources where new uses for summer cooling and winter heating are involved in the use of an existing well unless the uses are for domestic or for farm use. Even though in this case the water was not consumed but used only for heating and cooling the effect upon changes in the temperature of the affected ground water brought the use under the control intended by the Legislature. In this instance a closed circuit pipe comes in contact with the water in the well, and the well water is used only to heat water when used in connection with a heating system and to cool water when used in connection with a cooling system.

Volume 36, Page 244

December 11, 1951

Brief Comment

The Legislature must authorize the construction of bridges over the navigable waters of the State of Maryland.

(Note: This applies only where legislative authority is required for financing. PMG)

Volume 36, Page 171

November 15, 1951

Brief Comment

A permit from the State of Maryland (Department of Geology, Mines and Water Resources) is required for the federal government to construct a dam at Little Falls on the Potomac, since the site for the proposed dam is above tide water and the Potomac River lies wholly within the State of Maryland.

Volume 36, Page 244

December 11, 1951

Brief Comment

A permit from the State Roads Commission is required for the construction of a bridge over navigable waters in Maryland.

(Note: Permission from the following is required for the construction of bridges over navigable waters in Maryland:

1. Corps of Engineers, U. S. Army.
2. State Roads Commission.
3. General Assembly, if authority for financing is involved.
4. Department of Water Resources, if over the Potomac River. PMG.)

Volume 38, Page 173

March 4, 1953

Brief Comment

The State Board of Health may order the extension of sewerage service by the Washington Suburban Sanitary Commission into areas over which that Commission has jurisdiction where the lack of such service is prejudicial to public health.

Volume 37, Page 230

June 3, 1952

Brief Comment

The State Board of Health may order the County Commissioners of Anne Arundel County to erect a sewerage disposal and treatment plant where the waters of the State are being polluted by sewage in a way dangerous to health. The fact that a sanitary district exists which has jurisdiction over the same area does not, in our opinion, relieve the county of its responsibility. Indeed various provisions of the Sanitary Commission Law indicate that the County Commissioners retain ultimate power and responsibility.

Volume 40, Page 252

July 14, 1955

Dr. Robert H. Riley, Director
State Department of Health

In your letter of June 28th, you have requested that this office clarify the authority of the Department of Health and the Deputy State Health officers to abate nuisances which come to their attention in various county jurisdictions.

Generally speaking, there are two specific provisions dealing with abatement of nuisances. In the opinion of this office, these provisions are separate and distinct; and the Board of Health can proceed under either of them as it may desire under the circumstances in each case presented.

Under Section 2 of Article 43 of the Annotated Code of Maryland (1951 Ed.) the State Board of Health is directed to inquire into and investigate all nuisances "affecting the public health," and is empowered to apply to the Judge of the Circuit Court for the county in which the nuisance exists for an injunction to restrain the nuisance. This procedure for an injunction states that it shall be by information or petition filed in the name of the State Board of Health. It is to be noted that under this Section no notice to the party responsible for the nuisance is required, although, of course, you may, by your own rules or

policy as a practical matter, deem it expedient to have the nuisance voluntarily abated before proceeding under Section 2. Proceedings under Section 2 may be initiated by the Board of Health itself without the necessity of a written complaint, as required under Section 49 of Article 43. In this connection, reference is made to City of Baltimore v Board of Health, 139Md.210(1921) in which the court stated, pp. 216-217, that the State Board of Health is by this Section authorized to apply to the Judges of the Circuit Court for the county where the nuisance exists for an injunction. In our informal opinion to you of November 17, 1953, we indicated that the State Board of Health was free to proceed to abate nuisances under Section 2 on its own initiative.

Under the provisions of Section 49 of Article 43 of the Annotated Code of Maryland (1951 Ed.) the Board of Health is empowered to abate nuisances on the written complaint of a legally qualified medical practitioner, or two persons affected by the nuisance under the procedure there outlined. This procedure requires that the Board, after receiving the complaint, investigate the nuisance, determine that it "injuriously affects the life or health of any person," serve a notice on the person responsible for the nuisance, and in the event of refusal or neglect to comply, then criminal proceedings can be initiated, failure to comply with the notice to abate the nuisance being a misdemeanor. Section 49 thus provides for a different remedy to be used under a different form of procedure. As stated in our informal opinion to you of November 17, 1953, the written complaint is a necessary prerequisite to proceeding under Section 49. This prerequisite is, however, not required under Section 2 in injunction proceedings.

Your attention is also invited to Section 50 of Article 43 of the Annotated Code of Maryland (1951 Ed.). Under this Section, the local boards of health are empowered to serve notices as to their "requirements" for the abatement of nuisances within their respective jurisdictions. Civil penalties are payable by persons refusing or neglecting to comply with such notices.

Jurisdictional questions between local boards as to particular nuisances are to be settled by the State Board. In our opinion, such action may be taken by the local board on its own initiative if its own investigations reveal a nuisance in its jurisdiction.

C. Ferdinand Sybert, Attorney General
Frank T. Gray, Asst. Attorney General

Volume 41, Page 97

January 25, 1956

Mr. Joseph O' C. McCusker, Secretary
Board of Public Works

I received your letter of January 20th enclosing therein documents relating to the application of the Smoot Sand and Gravel Corporation for permits to dredge in the vicinity of Mt. Vernon and Craney Island in the Potomac River. You have asked for our comments with respect to the two applications.

As to the application for permission to dredge near Mt. Vernon, I believe that the Board of Public Works would be authorized to consider the facts there set forth in making its determination as to the advisability of granting an exclusive license to the Smoot Sand and Gravel Corporation for a five year period. The company outlines the area involved, which generally lies north and south of Mt. Vernon on the Virginia side of the channel. The application points out that there presently

exists a foul and odorous situation because of the shoal waters. This condition creates a very undesirable situation immediately in front of one of our important National Shrines. In the past the Corps of Engineers of the United States Army has permitted dredging in the area, and they would like to have further dredging done so that there will be available an area into which silt dredging from the channel of the potomac may be deposited.

In summary, as to the application for the area near Mt. Vernon, your Board might well consider that it would be advantageous to the State of Maryland and its citizens to grant the license for a nominal consideration to cover the cost of issuance of the same to The Smoot Sand and Gravel Corporation.

A somewhat different situation exists as respects the area surrounding Craney Island. The documents forwarded in that regard indicate that Craney Island, comprising some twenty odd acres of land, has, by deed, passed to the ownership of the Smoot Sand and Gravel Corporation. Smoot takes the position that this island, which lies west of the channel line on the Virginia side, establishes "riparian rights" in them and that they should not be required to obtain a license from your Board before proceeding with dredging in the area. We do not agree with the legal contention of the company. As we have heretofore pointed out in our correspondence, we believe that the entire interest in the land underlying the Potomac River from the channel line on the Virginia side to low water mark on the Virginia side is in the State of Maryland. We do not in any way mean to indicate that we believe Craney Island, which was patented by the Smoot Corporation's predecessor in title, belongs to the State of Maryland. Our remarks have reference to the area surrounding Craney Island as distinct from the island itself.

Under our code provision (Article 27, Section 572), the Legislature gives the right to any "riparian owner of land bordering on said rivers, . . ." to either take gravel or allow others to take gravel under written contract. By nature, an island is not the type of real property to which riparian rights attach. Riparian rights are normally attached to fast land. This legal fact is indicated by the rule that an island which forms in a stream or body of water, by reason of the deposit of alluvial matter, belongs to the owner of the land on which the island is formed. In some states, however, riparian owners are by statute given the title to such new formations opposite their land. This is the rule in Maryland. Melvin V. Schlessinger, 138 Md. 337; Tiffany, Real Property, Third Edition, Section 1227, pages 636-637.

In addition to the legal rules heretofore cited, our statute by its terms, clearly indicates that the riparian owners there referred to are persons owning fast land, as distinct from the owners of islands. It should also be noted that if an island owner should be considered a "riparian owner" within the terms of our statute, it would be extremely difficult to determine the extent of his rights thereunder.

May I suggest to you, however, that the considerations heretofore outlined with respect to the Mt. Vernon dredging project may have some bearing on the Craney Island project. It may be that your Board would believe after hearing from the officers of the corporation that it would be advantageous to the State and its citizens to grant a license to The Smoot Sand and Gravel Corporation, for a nominal consideration, to take sand and gravel from the Craney Island area.

I would suggest that you ask the corporation's officers to appear before your Board at the time of its meeting to present the reason why such dredging in the Craney Island area might prove advantageous to the State. May I suggest also that you advise them of our views as to the legal position which they have taken in the Craney Island matter.

Norman P. Ramsey, Deputy Attorney General

October 16, 1956

Mr. Robert M. Brown, Chief
Bureau of Environmental Hygiene
State Department of Health

You have recently requested our advice concerning the responsibility of the State Board of Health to join with the Water Pollution Control Commission in administering a water pollution control program under Public Law 660 (84th Congress), which amended the Federal Water Pollution Control Act (33U.S.C.A.466-466(j)). Section 5(a) of this enactment provides for an appropriation for the fiscal year ending June 30, 1957, and for succeeding fiscal years for grants to states "to assist them in meeting the cost of establishing and maintaining adequate measures for the prevention and control of water pollution." Section 6(a) authorizes grants to a State "for the construction of necessary treatment works to prevent the discharge of untreated or inadequately treated sewage or other waste into any waters, and for the purpose of reports, plans and specifications in connection therewith."

By letter, dated August 28, 1956, to the Acting Secretary of the Department of Health, Education and Welfare, the Governor designated the Water Pollution Control Commission as the official State agency authorized to carry out the provisions of Public Law 660. You state that although there is little doubt that the Commission is the proper agency to administer grants to States under Section 5(a), the Board of Health has traditionally been the State agency primarily responsible for preventing water pollution arising as a result of improper sewage treatment; and you inquire as to the Board's part in administering funds available under aforesaid Section 6(a).

Prior to 1947, the State Board of Health had sole responsibility for programs designed to prevent water pollution affecting the health of the people of the State, whether such pollution resulted from discharge of industrial waste or from untreated or inadequately treated sewage. However, by Chapter 697 of the Acts of 1947 (codified as Sections 34-45 of Article 66C of the Code), the Legislature created the Water Pollution Control Commission with wide powers to prevent pollution in the waters of the State. Section 34 defines pollution as --

> the discharge or deposit into any of the waters of the State of any liquid or solid substance or substances which may create a nuisance therein or render such waters unclean or noxious so as to be detrimental to the propagation, cultivation or conservation of animals, fish or aquatic life, or unsuitable with reasonable treatment, for use as present or possible future source of public water supply or unsuitable for commercial, industrial, agricultural, recreational or other reasonable uses....

Section 43 provides that nothing in the Water Pollution Control Law should be construed "to alter, change, modify or restrict the jurisdiction of the State Board of Health of Maryland as set forth in Article 43 and the amendments thereto of the Annotated Code of Public General Laws of Maryland."

Section 366 of Article 43 defines the powers of the State Board of Health, with respect to the supervision and control over the waters of the State, as follows:

> The State Board of Health shall have general supervision and control over the waters of the State, in so far as their sanitary and physical condition affect the public health and comfort; and it may make and enforce rules and regulations, and order works to be executed, to correct and prevent their pollution. It shall investigate all sources of water and ice supply, and all points of sewage discharge. It shall examine all existing public water supplies, sewerage systems and refuse disposal plants and shall have power to compel their operation in a manner which shall protect the public health and comfort, or to order their alteration, extension or replacement by other structures when deemed necessary. After April 16, 1914, it shall pass upon the design and construction of all public refuse disposal plants which shall be built within the State.

It is clear that the responsibility of the State Board of Health relates solely to water pollution conditions which adversely affect the public health and comfort, and does not extend to conditions detrimental to the propagation, cultivation or conservation of animals, fish or aquatic life. On the other hand, even though the water pollution control law when codified, was placed in Article 66C relating to natural resources generally, it is quite clear from Section 34 of Article 66C that the Commission's jurisdiction likewise extends to water pollution conditions affecting the health and comfort of the public. It is in this latter area that there is an over-lapping jurisdiction with respect to which both the State Board of Health and the Water Pollution Control Commission may, under existing law, exercise control. Had the Legislature not included Section 43 of Article 66C in Chapter 697 of the Acts of 1947, it might well have been said that the intention was to remove from the jurisdiction of the State Board of Health all the water pollution control functions that it had traditionally exercised and to transfer same to the newly created Water Pollution Control Commission. However, the above Section clearly indicates a legislative intention that the two State agencies should have coordinate responsibility in areas where the public health and comfort are affected by water pollution.

At the conference recently held in this office at which you and Mr. Paul W. McKee, Director of the Water Pollution Control Commission, were present, you stated that the two agencies had some time ago agreed upon a manner of operation in this area of overlapping jurisdiction. We understand that it was decided that the Water Pollution Control Commission would have primary responsibility with water pollution resulting from the discharge of industrial waste and that the State Board of Health would have primary responsibility with respect to water pollution resulting from untreated or inadequately treated sewage. You and Mr. McKee further stated that although this practice has not been the subject of express legislation, the budgets of each agency have consistently reflected the fact that personnel of the State Health Department have concerned themselves primarily with sewage pollution, while personnel of the Water Pollution Control Commission have been concerned with problems of industrial waste pollution. Each year these budgets have been approved by the legislature, thus giving legislative sanction to this administrative practice.

In view of the statutory provisions providing for overlapping jurisdiction of the two agencies in certain areas and in view of the long-standing administrative practice referred to herein above, it is our opinion that both the Water Pollution Control Commission and the State Board of Health are the official agencies of the State of Maryland authorized to carry out the provisions of Public Law 660. In other words, the

over-all program contemplated by Federal authorities will be undertaken in the State of Maryland as a joint effort on the part of these two agencies. In particular, it would appear that the Water Pollution Control Commission is the proper agency under Section 5(a) of Public Law 660 to receive and administer the grants provided for thereunder, in view of the fact that such grants are to be used for establishing and maintaining adequate measures for the prevention and control of water pollution in general. Similarly, the State Board of Health would appear to be the proper agency to receive and administer grants under Section 6(a), since such grants are for the construction of necessary treatment works to prevent the discharge of untreated or inadequately treated sewage into waters of the State. In both instances, however, you two agencies will, of course, continue to cooperate with each other to further this joint program.

We are sending two extra copies of this letter to the Governor so that he may transmit one copy to the Acting Secretary of the Department of Health, Education and Welfare. The latter should be advised that the State Board of Health has, under Maryland law, concurrent responsibility with the Water Pollution Control Commission for enforcing State laws relating to the abatement of water pollution.

Norman P. Ramsey, Deputy Attorney General
Alexander Harvey II, Assistant Attorney General

Volume 41, Page 434

January 3, 1956

Mr. Paul W. McKee, Director
Water Pollution Control Commission

We have your letter of November 28, 1955, requesting our advice in connection with the possible pollution of a stream by an industry discharging waste water into the stream. You state that although the stream rises several miles above the industry's property, for a distance of approximately one mile land on both sides of the stream is owned by the industry. Further down stream, where the stream leaves the industry's property, the effect of any discharge is lessened. You ask whether the Commission may lawfully require the discharge on the industry's property to satisfy your effluent requirements.

Section 34 of Article 66C of the Annotated Code of Maryland (1951 Ed.) defines "pollution" as "the discharge or deposit into any of the waters of the State of any liquid or solid substance or substances which may create a nuisance therein or render such waters unclean or noxious so as to be detrimental to the propagation, cultivation or conservation of animals, fish or aquatic life...."

The same section defines the term "waters of the State" to include both surface and underground waters within the boundaries of the State, including all ponds, lakes, rivers and streams.

It is apparent from these definitions that a stream which flows through private land may be considered to be "waters of the State" and that the pollution of a stream, even though such pollution occurs on private property at a point where land on both sides of the stream is held by a private owner, is subject to regulation under the statute by the Water Pollution Control Commission. The situation involved here does not concern a pond, lake or stream wholly on one individual's private property, and we will, therefore, express no opinion as to the Commission's right to regulate the pollution of such a body of water, although the statute may well be broad enough to apply to such a situation.

Our conclusions in this regard are supported by Section 38 of Article 66C, which provides, in part, as follows:

> The Commission or any agent authorized by the Commission to represent the Commission shall have the right to enter at all reasonable times in or upon any private or public property for the purpose of inspecting and investigating conditions relating to the pollution of any of the waters of the State....

Section 39 makes it unlawful for any person to discharge or permit the discharge into any of the waters of the State any waste or polluting substances. Accordingly, an industry discharge into a stream flowing through the industry's property may amount to pollution within the terms of the Statute, and the Commission is empowered to make such inspection and investigation on such property as may be necessary to determine whether such pollution may be occurring.

Norman P. Ramsey, Deputy Attorney General
Alexander Harvey, II, Asst. Attorney General

Volume 41, Page 161

June 8, 1956

Dr. Joseph T. Singewald, Jr., Director
Department of Geology, Mines and Water Resources

We received your letter requesting our opinion in connection with the proper interpretation of a portion of Section 669 of Article 66C of the Annotated Code of Maryland (1951 Ed.). Section 669(a) provides as follows:

> From and after January 1, 1934, it shall be unlawful for the State or any agency thereof, any person, partnership, association, private or public corporation, county, municipality or other political sub-division of the State, to construct, reconstruct or repair any reservoir, dam or waterway obstruction; or to make or construct, or permit to be made or constructed, any change therein or addition thereto; or to make, or permit to be made, any change in, addition to, or repair of, any existing waterway obstruction; or in any manner to change or diminish the course, current, or cross-section of any stream or body of water, wholly or partly within this State, except the tidal waters, without a permit from the Water Resources Commission, in writing, previously obtained, upon written application thereof to said Commission. Nothing in this section shall be construed to apply to any dam or obstruction which is ten feet or less in height above the elevation of the stream bed or waterway, nor shall it apply to any reservoir with a storage capacity of less than one million gallons, nor shall it apply to any structure for the impounding of water over non-tidal swamp lands for the propagation of muskrats.

We understand that the District Engineer of the Corps of Engineers of the United States Army, Baltimore District, contends that a reservoir impounding more than one million gallons of water is not subject to control by the Water Resources Commission under this Statute if the reservoir is created by a dam of less than 10 feet in height. In our opinion, the Statute is intended to control a reservoir which impounds a million gallons of water, whatever may be the height of the dam which creates

the reservoir.

The provisions of the Statute apply to three categories: (1) reservoir, (2) dam, (3), waterway obstruction. Although a dam may create a reservoir, a dam and a reservoir are two entirely different things. According to Webster's International Dictionary (2nd Ed.), the usual and ordinary meaning of a dam is: "a barrier to prevent the flow of water"; and a reservoir: "a place where water is collected and kept for use when wanted."

Therefore, whether or not a reservoir is created by a dam, it is subject to the provisions of Section 669(a) unless exempted under the last sentence thereof. The first portion of the last sentence exempts dams or waterway obstructions which are 10 feet or less in height above the elevation of the stream bed or waterway. This exemption applies in no way to a reservoir, but is intended to control dams or any other structures obstructing a waterway. The second part of this sentence applies solely to a reservoir and exempts any reservoir with a storage capacity of less than one million gallons.

In our opinion, if a reservoir has a storage capacity of a million gallons or more, the necessary permit must be obtained whether or not such reservoir was created by a dam or waterway obstruction of 10 feet or less in height. The Legislature clearly intended that where a quantity of water of a million gallons or more was impounded, the Water Resources Commission should possess the powers of control specified in this Section, in view of the fact that the public safety and welfare are obviously affected by the impounding in one location of large bodies of water.

C. Ferdinand Sybert, Attorney General
Alexander Harvey, II, Assistant Attorney Gen.

(Letter to Dr. Singewald)

June 13, 1957

Dr. Joseph T. Singewald, Jr., Director
Department of Geology, Mines and Water Resources
102 Latrobe Hall, The Johns Hopkins University
Baltimore 18, Md.

Dear Dr. Singewald:

You requested our opinion as to the meaning of the words, "the use of water for an approved water supply of any municipality," in Section 668 of Article 66C of the Annotated Code of Maryland (1951 Ed.).

The State's control over water is divided into several categories: quantity, quality, distribution and cost to the consumer. The Legislature has delegated these several categories of control to different State agencies. To the State Board of Health has been delegated control of the sanitary and physical aspects of water, Chapter 810, Acts of 1914 (codified as Secs. 365-384, Article 43). To the Water Pollution Control Commission, he has committed the control of the pollution aspects of water, Chapter 697, Acts of 1947 (codified as Sections 34-45, Article 66C). To the Commission of Geology, Mines and Water Resources has been assigned control of the appropriation and use of water, Chapter 526, Acts of 1933 (codified as Sections 666-681, Article 66C) and Section 12A, Chapter 508, Acts of 1941 (codified as Section 15, Article 66C).

The extraction and distribution of water has been delegated to several instrumentalities; there was specific legislation authorizing the City of Baltimore to provide its own municipal water system and general authority was given to cities and towns by Chapter 641, Acts of 1927 (codified as Sections 387-405, Article 43), and to special public

corporations by Chapter 463, Acts of 1951 (codified as Sections 406-427, Article 43). The control of cost to the consumer is committed to the Public Service Commission, in the case of private water companies and in the case of political subdivisions upon their voluntary application. Chapter 441, Acts of 1955 (codified as new Article 78) which supersedes similar provisions in the previous Article 78 (Sections 72 and 73).

The phrase, "the use of water for an approved water supply of any municipality," is an exception to the general requirement of Section 668 that no water shall be appropriated or used without the consent of the Water Resources Commission. Exceptions should be strictly construed. This Section and the other Sections 668-681 were enacted by Chapter 526 of the Acts of 1933 and are now codified under the subtitle "Water Resources," in Article 66C.

Since Chapter 526 of the Acts of 1933 did not statutorily define the words "approved" and "municipality", it is necessary to review the then existing statutory provisions governing municipal water supply systems in order to understand what was intended by the Legislature in the use of these words. State v. Fisher, 204 Md. 307, 314. At the time that Chapter 526 was adopted, there were two statutes which bore on the problem. The State Board of Health had for many years the duty and authority to approve municipal and other water supply systems (Sec. 366, Article 43). It was this approval to which the Legislature was referring when it enacted Chapter 526 in 1933. Since 1927, the mayor and council of a city, or the commissioners of a town have had the right to establish a municipal water system. There being no other general provision at the time for a municipal water system, the Legislature in 1933 used the word "municipality" to designate a water supply system established and operated by a city or town in accordance with Sec. 387 or a system excepted by Sec. 405 of Article 43.

The Legislature subsequently recognized the existence of such definitions of the word "municipality" when it enacted Chapter 463, Acts of 1951. In Chapter 463, the Legislature found it necessary to give a special and enlarged definition to the word "municipality" so that for the purpose of that Act it would include a county, village, sanitary district, or other political subdivision, in addition to a city or town. Section 406(e), Article 43. It will be noted that in Article 43 of the Bagby Code (1924 Ed.), Chapter 810 of the Acts of 1914 was codified under the subtitle, "Water, Ice and Sewage," and in the 1929 Supplement to the Bagby Code (1924 Ed.), Chapter 641 of the Acts of 1927 was added to that subtitle. The Legislature must of necessity have construed the use of the words "approved" and "municipality" in the sense in which they are used, Chapter 810, Acts of 1914, and Chapter 641, Acts of 1927, as codified in the subtitle, Annotated Code of Maryland (1924 Ed. and 1929 Supp.).

It is also important to note that in Sections 348Q and 348R, Chapter 641, Acts of 1927 (codified as Sections 404-405, Article 43), the Washington Suburban Sanitary Commission, the Anne Arundel Sanitary Commission, the Baltimore City Metropolitan District, and Baltimore City are specifically excepted from that Chapter, which refers to municipal water systems. Section 410U and 410V of Chapter 463, Acts of 1951 (codified as Sections 426-427, Article 43) exclude from that Chapter's operation the State Board of Health, the Department of Geology, Mines and Water Resources and the Water Pollution Control Commission, and also the Counties of Montgomery, Prince George's and Anne Arundel. The Chapter which created the Water Resources Commission exempted: existing uses, federal government uses, and existing laws relating to the Public Service Commission, the State Department of Health and the City of Baltimore. Section 15, Chapter 526, Acts of 1933 (Codified as Section 679, Article 66C).

It is clear from analyzing the several statutory provisions relative to the different aspects of water control that the Legislature has seen fit to delegate the several aspects to various State agencies and that it has, by its several statutory saving clauses, attempted to prevent conflict or

repeals by implication. With this general purpose in mind, the Legislature obviously used words in one chapter in conformity with words in already existing statutory provisions. It is clear that the words in the exemption in Section 668 of Article 66C were intended in 1933 to refer to a municipal water system established or operated under the provisions of 387 of Article 43 or excepted by Section 405 of Article 43 and which has been approved by the State Board of Health under the provisions of Section 368 of Article 43. The word "municipality" has been expanded since 1933 by Chapter 463, Acts of 1951. See also Nevenschwander v. Washington Suburban Sanitary Commission (1946) 187Md.67,74-76. All the statutes and decisions should be considered together since they are in pari materia.

In our opinion, the word "municipality" in Section 668, Article 66C, now means any political subdivision of the State and the word "approved" refers to an approval of the State Board of Health.

Answering specifically your several questions, the test is not whether or not a municipality is an incorporated town, but whether it is a political subdivision of the State. The word "municipality" refers to a water supply operated by a political subdivision or authority, but does not include a private water company. The statute authorizes a municipal water system to extend beyond the limits of a city or town; the town limits are not controlling. Sections 388, Article 43.

Whether a particular water system is a municipal system is a question of fact. Although a private water company would not qualify for an exemption, each particular water user must establish the factual and legal basis for any exception and the burden of proof is on the claimant.

Very truly yours,

Clayton A. Dietrich, Asst. Atty. General

(Letter to Dr. Singewald)

June 19, 1957

Dr. Joseph T. Singewald, Jr., Director
Dept. of Geology, Mines and Water Resources
102 Latrobe Hall, The Johns Hopkins University
Baltimore 18, Md.

Dear Dr. Singewald:

This will acknowledge your letter dated June 18, 1957, requesting further detail concerning our opinion of June 13, 1957.

In answer to your first question, the meaning of the 1933 law has been extended by subsequent statutes and decisions which are in pari materia. At present, the phrase "water supply system of a municipality" means a system which is both owned and operated by a political subdivision of the State of Maryland, and does not include a public water supply system owned by a private water company.

In answer to your second question, the word "user" as used in our letter meant the person or organization that extracted the water from the earth or other natural body of water and did not refer to the ultimate consumer. Thus applied to your example, since the Bureau of Water Supply of Baltimore City is exempt, all users of water from that Bureau are likewise exempt. It was not our intention to employ the word "user" to refer to ultimate and remote users of water originally extracted by an exempt municipal water supply system.

I hope this clarifies the matter. If you have any further questions, do not hesitate to call them to our attention.

Very truly yours,

Clayton A. Dietrich
Asst. Attorney General

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August 2, 1957

Dr. Joseph T. Singewald, Jr., Director
Department of Geology, Mines and Water Resources

You request our opinion as to whether an applicant for a permit to drill for gas and/or oil may post a certified check in lieu of the performance bond required by Section 648V of Article 66C of the Annotated Code of Maryland (1956 Supp.). Section 648V provides in part as follows:

> Every holder of a permit to drill for gas or oil shall...
> (d) Post a performance bond to the State of Maryland with good and sufficient security conditioned upon compliance with the provisions of this subtitle, in the amount of $2,500.

Although there may be persuasive consideration for permitting a responsible and solvent applicant for a permit to post cash or certified check in lieu of a performance surety bond, nevertheless we believe the language of the statute is mandatory and does not allow any substitute. Where a mode of procedure is designated by statute, such procedure must be followed. Hughes' Case, 1 Bland 46. If a statute directs a particular procedure, ordinarily it is implied that no other procedure is permissible. Trust Co. v. Ward Baking Corp., 177Md.2.2,220. We are bound by the express and clear language requiring a performance bond.

Even if there were doubt, an alternate procedure is fraught with many administrative problems. To permit the posting of cash or certified check would require some formal undertaking in any event, so that the right of the State to appropriate all or any part of the cash or certified check would be clearly designated. Your Department would also be required to consider whether it would be necessary or desirable to bond its employees who handle the cash or certified check. There would be the problem of appropriate depository or other means of safeguarding the cash or certified check. These additional administrative considerations in themselves would be sufficient to weigh the scales in a case of reasonable doubt. Where a legislative or rule making body desires to authorize the substitution of cash for a bond, it has done so expressly. Compare Sections 128 and 129, Article 66½ of the Code and Rule 821 of the Maryland Rules of Procedure.

We are of the opinion that an applicant for permit under the new "Gas and Oil" subtitle of Article 66C is required to post a performance surety bond and that neither cash nor a certified check may be accepted as a substitute.

C. Ferdinand Sybert, Attorney General
Clayton A. Dietrich, Asst. Attorney General

July 22, 1957

Dr. Joseph T. Singewald, Jr., Director
Dept. of Geology, Mines and Water Resources

This will acknowledge your recent letter requesting our opinion as to whether it is necessary for well drillers to obtain "construction firm and company" licenses from the State License Bureau, pursuant to Section 168, Article 56, Annotated Code of Maryland (1951 Ed.); Section 168 is, in part, as follows:

> Any person, firm or corporation accepting orders or contracts for doing any work on or in any building or structure, requiring the use of paint, stone, brick, mortar, wood, cement, structural iron or steel, sheet-iron, galvanized iron, metallic piping, tin, lead, electric wiring or other metal, or any other building material, or who shall accept contracts to do any paving or curbing on sidewalks or street, public or private property, using asphalt, brick, stone, cement, wood or any composition, or who shall accept an order for or contract or excavate earth, rock, or other material for foundations or any other purpose, or who shall accept an order or contract to construct any sewer of stone, brick, terra-cotta, or other material, shall be deemed to be carrying on the business of construction....

You advise us that the Chief Inspector of State Licenses notified well drillers that they are now required to obtain an additional construction license since they "excavate earth, rock, or other material for... any other purpose."

The present Section 168 of Article 56 is derived from Chapter 704, Acts of 1916, which was last amended and recodified by Chapter 53 of the Acts of 1941.

By Chapter 325, Acts of 1945, the Legislature provided for the regulation, supervision and licensing of well drillers. These provisions are now codified as Sections 682-702 subtitle, "Well Drillers," Article 66C. During the period between 1916 and 1945, the State License Bureau never required well drillers to obtain construction licenses. You advise us that this is the first year that the State License Bureau has attempted to require well drillers to obtain the additional license. Thus, we find a long established administrative practice by the State License Bureau of exempting well drillers from the construction license provision. The 1916 enactment was effective for almost thirty years before well drillers were expressly required to be licensed, and during the twelve year period since the enactment of the well drillers statute, there has been no administrative interpretation which deemed well drillers to be included in the construction license provision. Great weight must be given to this administrative practice, Arnreich v. State, 150Md.91,103.

The construction firm licensing provision is a revenue producing measure and the well drilling licensing is a regulatory device with revenue producing aspects. Compare Section 669, Article 66C. The two provisions are not mutually exclusive. Compare Maguire v. State, 192Md. 615,618. To require two licenses for well drillers, although not illegal or improper, would be a duplication. In the absence of clear manifestation of intention on the part of the Legislature, the two enactments should not be so construed. Although double taxation is not improper, nevertheless, it should not be presumed. Where language in a taxing statute is

ambiguous, it should be construed in favor of the taxpayer. Baltimore Foundry v. Comptroller, 211 Md. 316, 319. The general language in the construction firm and company licensing provision, which it is suggested might include well drillers, stands in contrast to the precise language of the well driller licensing law. In statutory construction, particular provisions prevail over general provisions. Maguire v. State, supra, page 623. The Construction license provision in the earlier Act, and to the extent of any inconsistency, the later Act specifically licensing well drillers would prevail. Attention is invited to Section 2, Chapter 325, Acts of 1945, which repeals all existing laws to the extent of inconsistency. It is clear from Section 2 that the Legislature intended by this Act to delegate the licensing of all well drillers to the Department of Geology, Mines and Water Resources and thereby to preempt that licensing field.

It is our opinion that the words "any other purpose" do not now include well drillers, and thus a well driller is not required to obtain the additional license applicable to construction firms and companies so long as his operation is restricted to well drilling.

C. Ferdinand Sybert, Attorney General
Clayton A. Dietrich, Asst. Attorney General

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1959

Brief Comment

In conclusion, it is our opinion that the boundary line between Maryland and Virginia fixed as the low water mark of the Potomac River on the South shore changes from time to time due to the imperceptible natural causes of erosion and accretion.

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1959

Brief Comment

> We are, therefore, of the opinion that title to the sand and gravel in the bed of the Potomac River on the Virginia side of the channel is now in the State of Maryland and that the riparian owners of Virginia lands do not have any right to the materials in the bed thereof.
> We are, therefore, of the opinion that the Board of Public Works has the authority to grant a license to the Smoot Sand and Gravel Company to dredge and remove sand and gravel and other materials from the bed of the Potomac on the Virginia side of the channel, and it may charge whatever it deems to be adequate consideration for the same.

Previous Maryland law granting to riparian owners on the Virginia shore the right to dig, dredge, take and carry away sand, gravel or other materials in the bed of the river opposite their lands from the high water mark to the outer channel nearest the Virginia shore was a mere license which the Maryland Legislature could revoke at any time. The Maryland General Assembly by Chapter 498, Acts of 1957, revoked any privilege or rights previously granted to Virginia riparians on the Potomac.

November 20, 1959

Dr. Joseph T. Singewald, Jr., Director
Department of Geology, Mines and Water Resources

We have just received your letter advising us of a proposal by the federal government for the discharge of sewage effluent from the Washington area via pipeline into deep aquifers located in the Maryland Coastal Plain. You state that this method of sewage effluent disposal would require drilling deep wells to tap aquifers lying at depths greater than those now tapped by water wells and pumping the effluent down the wells into such aquifers. You inquire as to the jurisdiction and control of your Department over the subject matter of this proposed plan. More particularly, you ask whether the approval and consent of your Department is required to discharge the effluent into the aquifers, and whether your Department would have any control over the drilling and maintenance of wells that would be required in connection with this plan.

The powers and duties of the Department of Geology, Mines and Water Resources are primarily contained in Sections 718-755 of Article 66C, Annotated Code of Maryland, (1957 Ed.). Section 718 provides that it is the policy of the State to conserve, protect and utilize its water resources in accordance with the best interests of the people of Maryland, and to control, so far as practicable, the appropriation or use of surface and underground waters of the State. Section 719 directs the Department of Geology, Mines and Water Resources to devise and develop a general water resources conservation program for the State contemplating, inter alia, the proper conservation, allocation and development of surface and underground waters in Maryland. Section 720 implements the declared policy of the Legislature as follows:

> From and after January 1, 1934, it shall be unlawful for the State or any agency thereof, any person or persons, partnership, association, private or public corporation, municipality, or other political subdivision of the State, to appropriate or use any waters of the State, surface or underground, without the consent or permit of the Department of Geology, Mines and Water Resources, in writing, previously obtained, upon written application therefor to the Department. Nothing in this section shall be construed to apply to the use of water for domestic and farming purposes....

The scope and extent of the Department's authority, as it relates to the first question before us, is largely to determine (1) with reference to the meaning intended by the Legislature of the phrase "appropriation or use of waters of the State," and (2) with reference to statutes in pari materia.

The term "waters of the State" embraces all surface and underground waters within the State's boundries. It has no significance with respect to the proprietary ownership of such waters. See Article 66C, Sec. 34, and Article 43, Sec. 387, Annotated Code of Maryland (1957 Ed.). As a further preliminary consideration, we must attribute to the Legislature the basic understanding that water is essentially a mineral substance which, in its natural state, is ordinarily regarded as constituting a part of the land in or upon which it is found. As such, it is in the nature of real estate but may be converted into personal property by segregating it from its natural stream or body. 56 Am. Jur. Waters, Sec. 2. It is from this point of legislative understanding that the words "appropriate" or "use,"

as applied to the waters of the State, must be interpreted. When so considered it is our opinion that these words are intended by the Legislature to encompass only a taking out, or conversion, setting apart, or segregation of water from its natural stream or body; and did not encompass, as an appropriation or a use, the passive employment of water solely as a receptacle or depository of waste substances.

The provisions of statutes in pari materia support this interpretation. Authority for the control of the pollution and despoilment of waters of the State is primarily vested in the Water Pollution Control Commission. Article 66C, Sec. 34-45, Annotated Code of Maryland (1957 Ed.). This legislation enacted subsequent to that creating your Department specifically provides that it shall be unlawful for any person, including the State, to discharge or permit to be discharged any waste or polluting substances of any kind into the waters of the State in violation of any duly authorized rule, regulation or order of the Commission. It follows, therefore, that the Legislature did not consider the disposal of waste substances into State waters as an "appropriation" or "use" thereof, and, as such within the sphere of authority to be exercised by your Department. See also the provisions of Section 387, et. seq. of Article 43, Annotated Code of Maryland (1957 Ed.) vesting in the State Department of Health broad and extensive authority over sewerage systems within the State, viz., the channels by which sewage is collected and disposed of, together with the body of water into which it is directly discharged.

The authority vested in the Department of Geology, Mines and Water Resources over the drilling and maintenance of wells provides, inter alia, that no well (other than drive point and hand dug wells) may be drilled except by a driller licensed by your Department; that a permit to drill a well must be obtained on behalf of the well owner prior to drilling; that well owners must maintain their wells in accordance with the rules and regulations promulgated by your Department; and that your Department shall make such inspections and take such samples of materials encountered in drilling wells as it deems necessary to enable it properly to supervise the construction, repair and maintenance of wells throughout the State. In its broadest sense a well, as defined in Section 753, is an excavation dug for water, and since your Department is authorized by rules and regulations to recognize variations in the primary use of wells, we think that the construction of a well for the sole purpose of disposing of waste substances therein is properly within the scope of your Department's control. It is, however, questionable that this control would be applicable to well drilling operations undertaken by the State iself. It is to be noted in this connection that the pertinent statutory provisions do not include the State either as a "person" or as an "owner". As action on the proposal in question could not be initiated without the State's assent thereto, and since it is not entirely clear to what extent the State will cooperate or participate with the Federal Government, we would suggest that more detailed information be obtained in this respect and the question of your control over such well drilling operations be re-submitted at that time.

C. Ferdinand Sybert, Attorney General
Robert C. Murphy, Asst. Attorney General

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June 3, 1959

Dr. Joseph T. Singewald, Jr.
Department of Geology, Mines and Water Resources

You have asked in your recent letter whether your Department has the

legal right to impose upon a privately owned water company the condition that it supply no water to customers for commercial cooling purposes unless the customer recharges the water back into the aquifer from which it originated. Your question is presented against this factual background.

Virtually the entire water supply of a small municipality has its source in a single artesian aquifer underlying a considerable part of the community. The community's principal supplier of water is the privately-owned water company which pumps from the aquifer. In addition, a number of individuals and industrial enterprises in the community have their own wells which also pump from the same aquifer. Because of these water appropriations the aquifer is being overpumped to the degree that water levels are falling at an alarming rate, and the community is heading for a crisis in its water supply.

You state that considerable quantities of water are being appropriated from the aquifer by the water company for commercial cooling uses of its industrial customers and; therefore, instead of being recharged back into the aquifer, such water is discharged to waste. You further advise that your Department, by virtue of powers vested in it, requires the recharge of water used only for commercial cooling purposes in permits issued directly to water users for such purposes from their own wells; but that you have not imposed such recharging requirements upon the water company's customers using water for the identical purpose. As above stated, your Department now questions its right to do so.

By Act of 1933, Chapter 526, as amended by Act of 1941, Chapter 508, codified as Sections 718-734 of Article 66C, Annotated Code of Maryland (1957 Ed.), it became the policy of the State to conserve, protect and utilize its water resources, both surface and underground, by controlling "so far as practicable" the appropriation or use thereof in accordance with the best interests of the people of Maryland. To effectuate this purpose, the Department of Geology, Mines and Water Resources was directed under Section 719 to devise and develop a general water resources conservation program, contemplating, inter alia, proper conservation, allocation and development of all surface and underground waters, such program to guide the Department in its issuance of permits to appropriate or use any waters of the State. It was then provided in Section 720, in part as follows:

> From and after January 1, 1934, it shall be unlawful for the State or any agency thereof, any person or persons, partnership, association, private or public corporation, county, municipality, or other political subdivision of the State to appropriate or use any waters of the State, surface or underground, without the consent or permit of the Department of Geology, Mines and Water Resources, in writing, previously obtained, upon written application therefor to the Department....

Section 724 provides that the Department shall set a day for a public hearing on any application for a permit to appropriate or use any of the waters of the State, and further provides, in detail, procedural requirements preliminary to such hearing, and the manner and scope of the hearing itself. Section 725 vests in the Department wide latitude in determining whether or not to grant a permit, and provides for the issuance of conditional permits as follows:

> ...In granting any permit authorizing any use or appropriation of water, ...the Department may include in the grant thereof such conditions, terms and reservations with respect to the character, amount, means and manner of such use...as it may deem reasonably necessary to preserve the proper control in the State and to insure the safety and welfare of the people of Maryland....

It is clear from the above that the Legislature intended to assert positive controls over water resources within the State. In doing so, however, it exempted certain uses from control. Thus, in Section 720, it is declared in effect that it shall not be illegal and shall not require a permit to use any water resources within the State for (1) domestic and farming purposes, and (2) for the use of water for an approved water supply of any municipality and (3) for any particular use in existence on January 1, 1934, provided such use was not thereafter abandoned. It was further provided, Section 732, that nothing in the Act shall be construed "to impair any riparian or other vested right...." Taken in its entirety, the Act recognizes two basic concepts. First, that the public at large has an interest in the conservation of water resources within the State sufficient to justify appropriate legislation to prevent the exploitation or waste thereof by the owner of land upon which such water is found, and second, that the extent of the State's power to legislate in this respect is subject to constitutional restrictions upon interference with property rights in non-navigable and underground waters.

In an early opinion we advised you that the statutory exemption pertaining to the "use of water for an approved water supply for any municipality" was intended to apply only to a system which was both owned and operated by a political subdivision of the State and was not intended to exempt a public water supply system owned by a private water company.

The water company which is the subject of your present inquiry was incorporated in 1913, acquiring at that time, with all requisite approvals, all rights, privileges, franchises and property of a predecessor water company supplying water to the particular community with which you are concerned. The company has been operational since its inception and was an existing, perfected utility franchise when the water law of 1933 was enacted. Its only source of water, and that of its predecessor, has been the artesian aquifer underlying its property, and this use for domestic and commercial water supply purposes has been continuous for over fifty years.

Underground waters have always been the subject of property rights in this State, and the Legislature expressly recognized this fact by providing for the protection of existing uses and riparian and other vested rights in water. In Washington County Water Co. v. Garver, 91 Md. 398, the overlying landowner's right of property in an underground stream flowing in a definite known channel was held to be analogous to that of a riparian owner in a surface stream. On the other hand, percolating waters which do not flow in a known definite channel, such as the artesian aquifer in the situation before us, have been held under the strict common law rule to belong absolutely to the overlying landowner, giving him the privilege of using the same at his pleasure, even though his use lessened or destroyed the supply of water to lots on adjoining premises. See Western Md. R. Co. v. Martin, 110 Md. 554. This unrestrained use of percolating waters was generally held to include sale for profit by water companies, and it was upon this basis that many water companies established their water supply systems. The resulting detriment with respect to owners of adjoining premises was such, however, that many states adopted the so-called reasonable use or correlative rights doctrine which holds rights in percolating waters to be correlative rather than unqualified, and restricts overlying landowner's use whether for domestic or industrial purposes to a reasonable or beneficial use directly incident to utilization of the overlying land. This rule has been repeatedly applied to water companies pumping percolating water for distribution or sale for public water supply purposes, where the water is taken in such quantities as are unreasonable with respect to adjoining premises. See 94 C.J.S. Waters Sec. 226: 56 Am. Jur. Waters, Sec. 117; 55 American Law Reports, Annotated pages 1385-1566. In Western Md. R. Co. v. Martin, supra (1909), our Court of Appeals gave favorable recognition to the rationale underlying application of the reasonable use doctrine in percolating waters.

It must be presumed that the Legislature was aware of these underground water doctrines when it enacted the 1933 water law. While it specifically exempted domestic and farm uses from any and all control, it did not provide any exemption for commercial uses except to declare that riparian and other vested rights in such water uses were not to be impaired. This was necessarily tantamount to legislative adoption of the rule of reasonable use of non-exempted percolating waters in that it could only mean that the Legislature intended commercial water use to come within the Department's sphere of control, but that this control was to be qualified, rather than absolute, so as not to deny a reasonable use of such waters for such purposes where riparian or other vested rights were involved. Determination of the question of what was a reasonable use was subject to the Department's studied evaluation in light of over-all available resources within the area to be affected. This authority was to some extent circumscribed by the blanket exemption contained in Section 720 for existing uses, which, as more fully detailed in Section 732, reads as follows:

> Nothing in this subheading shall be construed ...to prohibit, limit, impair or alter any particular use in existence on January 1, 1934, of any stream or body of water by any person, partnership, association, or corporation, public or private, unless such use is thereafter abandoned.

The manifest purpose of this exemption was to assure a prospective rather than a retrospective application of the control features of the law. This use exempted from control was, however, one of limited scope, being only of the particular quantity of water in use on January 1, 1934, so that appropriations in excess of such then existing use are subject to the law unless otherwise specifically exempted.

It is, therefore, our opinion that the water company's appropriations of water for commercial use in excess of the use existing for that purpose on January 1, 1934, are subject to the prior approval of the Department of Geology, Mines and Water Resources, in accordance with the principles of reasonable use above stated. Under Section 725 of the Act, the Department may include in the grant of a permit to use or appropriate water for commercial purposes "such conditions, terms and reservations with respect to the character, amount, means and manner of such use...as it may deem reasonably necessary to preserve the proper control in the State and to insure the safety and welfare of the people of Maryland.. "Accordingly, the Department may impose upon the water company, if "reasonably necessary" to these ends, the condition that it supply no water for commercial cooling purposes unless the customer recharges the water back into the aquifer. While it is understood that the ability of the customer to recharge the water depends entirely upon the existence of recharge facilities and that presently no such facilities exist, this is a matter to be worked out between the water company and its commercial customers and is in no sense a factor proscribing the authority of the Department to impose such a condition.

C. Ferdinand Sybert, Attorney General
Robert C. Murphy, Assistant Attorney General

(Letter to Paul McKee)

December 28, 1959

Mr. Paul W. McKee, Director
Water Pollution Control Commission
State Office Building
Annapolis, Maryland

Dear Mr. McKee:

I have your recent letter requesting a review of the proposed revisions to the Compact document creating the Potomac Valley Conservancy District and the Interstate Commission on the Potomac River Basin. You specifically inquired as to the effect of such proposed revisions on the authority of the Water Pollution Commission of Maryland and other agencies of the State having water control jurisdiction.

As you know, a compact made between states in the manner permitted or prescribed by the Federal Constitution is a law and, in legal effect, a contract binding on all the parties thereto, the obligation of which continues as long as the contract exists.

The preamble to the compact, as revised, provides the requisite substantive foundation for expanding the Interstate Commissions's field of interest to embrace the development, utilization and conservation of the waters of the Conservancy District, as well as the land resources associated therewith. While the preamble imparts no powers as such to the Inter-State Commission, it purports to establish it as an agency of the State.

Article II, Section A - E, as revised, broadens the breadth and scope of the Interstate Commission's activities and gives it, inter alia, the contractual right to cooperate with and assist the states in the formulation and coordination of plans, programs and other activities relating to stream pollution or to the utilization, conservation or development of waters and associated land resources of the Conservancy District. Operative within this framework, Article II F (2) gives the Interstate Commission the right to establish water quality standards in the waters of the Potomac River Basin, which standards will be binding upon the states if approved by the requisite vote of the commission, as provided in Article I, Section D, of the Revised compact. The vesting of this power in the Interstate Commission is manifestly repugnant to and cannot be reconciled with the vesting of the same power in the Water Pollution Control Commission of Maryland (Re: All waters of the State) under Article 66C of the Maryland Code, and in the State Department of Health under the pertinent provisions of Article 43 of the Code. If, therefore, the revised compact is adopted and ratified by the Maryland Legislature, it will represent the latest expression of its intention, and your commission will henceforth necessarily be divested of ultimate authority to establish water quality standards for the waters of the State of Maryland within the Potomac River Basin. Similarly, the Compact gives the Interstate Commission ultimate authority to establish various classifications of use for waters of the Conservancy District. While the right to establish water quality standards and the right to establish water use classifications would appear inextricably related, the two powers are as a matter of substance clearly separate and distinct. The necessity for the distinction may, by way of example, be pointed up by the differences between your regulation IV, relating generally to the waters of the State and Regulation IV-A, applying exclusively to the waters of the Baltimore Harbor area. The States are bound under the Compact to establish programs of treatment of sewage and industrial wastes which will meet or exceed standards established by the Interstate Commission. Enforcement of the Interstate Commission's directives is left to the states. Since implied repealers are not favored in the law, your

Commission possibly would retain authority to establish water quality standards of a more stringent nature than those established by the Interstate Commission. Your Commission, however, could not establish lesser standards.

Article III of the Compact, as revised, authorizes the Interstate Commission to establish Sections within itself and to vest therein any power or function which it has with respect to specific geographical areas in the Conservancy District. The Compact provides that the Sections may exercise such other powers and perform such functions as may be vested therein by the laws of the participating states or by the United States. Since the Interstate Commission is itself an agency of each state under the revised Compact and since its field of authorized interest in the Potomac River Basin has been considerably broadened, as aforesaid, the individual states, may without amending the Compact, legislate additional powers under the various sections. It is not clear, however, whether it is intended that such additional powers would be operative only within the framework of Article II of the Compact, or whether the Sections would be invested with any and all powers, functional and operational, in the matter of pollution, utilization, conservation and development of the waters of the Potomac River Basin and the land resources associated therewith. It is my opinion that the latter was intended. Thus, by way of example, the Department of Geology, Mines and Water Resources, which now has authority for the control of the appropriation and use of all waters of the State, could be divested by a simple legislative act of the Maryland Legislature of its power in this connection with respect to Potomac River waters within the territorial jurisdiction of Maryland. Inasmuch as Article III could be so interpreted, I would suggest that very definite clarification be secured as to the intended operation of the same. This would appear to be of fundamental importance to a number of agencies, including the soil conservation districts operating within the State Board of Agriculture and the erosion prevention works committed to the authority of the County Commissioners of the various Maryland counties bordering on Basin waters.

This letter is intended only as a general review of the Compact document, and I suggest that any specific questions you may have be directed to us in that form.

Very truly yours,

Robert C. Murphy
Assistant Attorney General

Volume 45, Page 88

May 26, 1960

Dr. Joseph T. Singewald, Director
Department of Geology, Mines and Water Resources

We have your letter of May 18, 1960, in which you advise us that your Department is in receipt of an application to lay a cable on the bed of the Potomac River, across the river in the tidal waters of the River, extending from Mason Neck in Virginia to Indian Head in Maryland. You inquire as to whether approval of this proposal by your Department, and issuance of a permit thereof is a necessary prerequisite prior to the undertaking of this project.

Section 722 of Article 66C, Annotated Code of Maryland (1957 Edition), provides as follows:

> It is unlawful for the State or any agency thereof, any person or persons, partnership, association, private or public corporation, county, municipality or other political subdivision of the State to construct, reconstruct, change, or make any addition to any conduit, pipe line, wire cable, trestle, or other device, structure or apparatus, in, under, through or over the bed or waters of the Potomac River, without obtaining a permit therefor from the Department of Geology, Mines and Water Resources. The obtaining, use and holding of such a permit shall be subject severally to the provisions concerning permits found elsewhere in this subtitle.

This Section, enacted as Chapter 757 of the Acts of 1957, explicitly requires that a permit be obtained from your Department prior to constructing any apparatus, structure or device, specifically including a wire cable, in, under, through, or over the bed or waters of the Potomac River. This Section does not distinguish between tidal and nontidal waters of the Potomac River and hence must be construed as encompassing the River in its entirety from shore to shore.

You cite, however, the provisions of Section 721 which provide inter alia that it shall be unlawful for the State or any person to construct or repair any reservoirs, dams or waterway obstructions, or in any manner to change or diminish the course, current or cross-section of any stream or body of water within the State, except tidal waters, without a permit from your Department. While you further point out that Section 722, above quoted, specifies that the obtaining of a permit to lay a cable on the bed of the Potomac River is to be subject to all provisions concerning permits, including those provisions set forth in Section 721, we do not think it is possible under any construction of these Sections to incorporate the exception as to tidal waters contained in Section 721 into the provisions of Section 722. Accordingly, it is our view that a permit must be obtained from your Department prior to constructing the cable on the bed of the Potomac River, irrespective of whether such construction is to be made in tidal or nontidal waters of the River.

C. Ferdinand Sybert, Attorney General
Robert C. Murphy, Assistant Attorney General

Volume 45, Page 22

April 8, 1960

Mr. William H. Bayliff, Executive Secretary
Board of Natural Resources

In your recent letter you asked whether the Board of Natural Resources has legal authority to coordinate the activities of its component departments by directing the policies and activities of those departments or whether the Board is merely an advisory agency.

Article 66C, Section I, Annotated Code of Maryland (1959 Supp.) created the Board of Natural Resources to coordinate the activities of the several State departments which are concerned with the conservation of natural resources. The Board's powers are established by Section 3 which provides that the Board shall discuss the problems of conservation, departmental, State or Federal, act as a clearing house for constructive suggestions and recommendations, deal with such conservation matters, complaints, suggestions or proposals as can be handled more satisfactorily by the Board than by the several departments represented upon said Board, and review the

work of each such department. The Board shall annually submit to the Governor a comprehensive report covering the activities, accomplishments and recommendations of the several departments represented upon said Board. Such report shall also include pertinent information on finance and budgets.

It is our opinion that the Board of Natural Resources is merely an advisory Board. A study of the statutes granting powers to the various departments whose activities are to be coordinated by the Board shows that these departments were given the power and authority to control themselves. The Board of Natural Resources is composed of the Chairman or Directors of the six Departments that are concerned with conservation of natural resources and eight other members. It is through general discussion prompted by those department heads and suggestions from all members that we believe the Legislature intended the Board to work out coordination of activities of the departments involved.

C. Ferdinand Sybert, Attorney General
Stedman Prescott, Jr., Deputy Attorney General

Volume 46, Page 63

June 6, 1961

Brief Comment

Dr. Joseph T. Singewald, Jr., Director
Department of Geology, Mines and Water Resources

We have your recent letter in which you advise us that treatment of sewage in waste stabilization lagoons has, under certain circumstances, been accepted by the State Department of Health as a satisfactory alternate to the conventional sewage treatment plant. You inquire whether such lagoons are subject to the provisions of 721 (a) of Article 66C of the Annotated Code of Maryland (1957 Edition).

After a thorough discussion and citations of authority the last sentence of the opinion stated as follows:

> Nevertheless, the powers vested in your Department by Section 721 (a) are clear, and unless and until the Legislature changes the law to exempt waste stabilization lagoons from the provisions of the section, we hold that such lagoons must be treated by you as reservoirs, subject to the prior permit provisions hereinbefore specified.

(Note: In 1962 by Senate Bill 32, Chapter 18, Laws of 1962, the Legislature exempted waste stabilization lagoons so the above opinion has no application to the law subsequent to June 1, 1962. P. M. G.)

(Letter to Paul McKee)

July 6, 1961

Mr. Paul W. McKee, Director
Water Pollution Control Commission
State Office Building
Annapolis, Maryland

Dear Mr. McKee:

This will acknowledge receipt of your proposed "statement of policy" revision. You request our review and comment thereon.

I think it would be unwise and at variance with Sections 34-45 of Article 66C of the Code for your Commission to totally disavow any and all responsibility for pollution resulting from discharge into the waters of the State of inadequately treated sewage. I think it would be advisable therefore to avoid any reference to "hazards of the public health" on the second line of page 24 of your booklet. Accordingly, I would suggest that the footnote appearing on page 24 be changed to read as follows:

> The Attorney General has ruled that Water Pollution Control Commission and State Department of Health have coordinate responsibility in areas where the public health and comfort are affected by water pollution. By a long established administrative agreement between these agencies, the Commission exercises primary responsibility with respect to water pollution resulting from discharge of industrial wastes and the Health Department exercises primary responsibility with respect to water pollution resulting from untreated or inadequately treated sewage. This administrative agreement has legislative sanction, see 41 opinions of the Attorney General 436.

Very truly yours,

Robert C. Murphy
Assistant Attorney General

Volume 47, Page 205

June 19, 1962

Mr. Paul W. McKee, Director
Water Pollution Control Commission
State Office Building
Annapolis, Maryland

Dear Mr. McKee:

In your letters of June 1 and June 5, 1962, respectively, you requested that we review for legal sufficiency the Commission's "Policy and Procedure for the Approval of Discharges of Wastes Containing Detergents" and "Policy and Procedure for the Approval of Waste Stabilization Ponds for Farm Animals and Operations." You have also requested whether the Commission can "establish standards, or utilize present standards, to control the quality of a discharge for an industrial operation into a municipal sanitary sewage system."

1. The legality of the proposed "Policy and Procedure" in each instance depends upon its intended use. If the standards set forth are expected to be met by voluntary compliance only, then the proposals need no further refinement. In the Water Pollution Control Law, Article 66C, Section 36 (b), Annotated Code of Maryland (1957 Edition), the Commission is authorized to "encourage voluntary cooperation by the citizens of the State..." and "to recommend standards for sewage and waste effluents discharged into the waters of the state."

It would appear from the language of the proposed "policy" however, that the Commission intends to enforce these provisions and to incorporate the procedures as part of the Commission's established body of administrative procedure set forth in its publication entitled "Water Pollution Control Law, Regulations and Policy" (1961 Edition). In such case, statutory requirements must be strictly observed.

Section 36 (d) of the Water Pollution Control Law, Supra, provides as follows:

> The Commission shall have the authority to, and shall enforce the provisions of this subheading and shall make and promulgate rules and regulations and conduct such investigations as shall from time to time be deemed necessary to carry out the provisions of this subheading. However, before finally adopting said rules and regulations, the Commission shall give at least thirty (30) days' notice, by publication, circular or otherwise, informing all persons who may be interested in such rules and regulations that the Commission will hear such persons on a certain day or days named in said notice for the purpose of receiving and considering suggestions before the final adoption of such rules and regulations. The said notice shall contain a copy of the proposed rules and regulations.

The Administrative Procedure Act, Article 41, Section 245 further provides:

> In addition to other rule-making requirements imposed by law:
> (a) Each agency shall adopt rules governing the formal and informal procedures prescribed or authorized by this subtitle. Such rules shall include rules of practice before the agency together with forms and instructions; provided, however, that such rules shall not be construed or implemented so as to interfere with the right of any lawyer to practice before any agency, or so as to grant the right to practice law to anyone not authorized so to do.
> (b) To assist interested persons dealing with it, each agency shall so far as is deemed practicable, supplement its rules with descriptive statements of its procedures.
> (c) Prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall publish or otherwise circulate notice of its intended action, and afford interested persons opportunity to submit data or views orally or in writing.

The Commission should, therefore, publish the proposals either by circular furnished directly to affected parties or by publication in a newspaper of general circulation in each county where affected parties are located, at least thirty days prior to action by the Commission. Such publications should specify a hearing date at which time the Commission

shall receive and consider suggestions by interested persons, orally or in writing. After final adoption of the proposals, they should be published, filed and made available to interested persons, as was done in the case of the regulations previously published in the Commission's bulletin referred to above.

2. The "Summary Statement," attached to the draft of the regulations and procedure relating to waste stabilization ponds, is an acceptable supplementary "descriptive statement" within the meaning of the statute. A statement of policy or explanation of procedures may supplement and illuminate rules and regulations for the benefit of the persons affected thereby. However, such statements may not create new requirements in addition to those set forth in the Commission's published rules and regulations.

3. In Section D-2 of the Commission's "detergent policy" submitted for review, the requirements are too vague and indefinite to be enforceable. Reference should be made to standards (as in Section D1) by which a person affected by this regulation may know when it is being violated.

4. In our opinion the Commission may "establish standards, or utilize present standards, to control the quality of a discharge from an industrial operation into a municipal sanitary sewage system."

The Water Pollution Control Law, above cited, provides in Section 39 as follows:

> It shall be unlawful for any person to discharge or permit to be discharged directly or indirectly into any of the waters of the State any waste or polluting substance of any kind as defined for the purpose of this subheading in violation of any duly authorized rule, regulation or order of the Commission....

The term pollution as defined in Section 34 of the statute is broad in its scope and includes any discharge creating a nuisance or rendering waters so unclean as to be "unsuitable with reasonable treatment" for certain specified uses. It would seem, therefore, that the Commission could create standards controlling discharge of industrial waste into a municipal sewage system where such discharge would tend to overload and tax the municipal facilities to an unreasonable extent. What is "reasonable" should be decided by the Commission in formulation of its standards, based upon the total effect of similar noxious discharges from the several sources thereof upon the capacity of the municipal treatment plant to eliminate the deleterious substances before discharge into waters of the State.

Thomas B. Finan, Attorney General
Loring E. Hawes, Asst. Attorney General

(Letter to Paul McKee)

June 29, 1962

Mr. Paul W. McKee, Director
Water Pollution Control Commission
State Office Building
Annapolis, Maryland

Dear Mr. McKee:

This is in answer to your letter of June 26, 1962, concerning the proposed laundromat installation in Havre de Grace.

For the reasons set forth in Item 4 of our opinion letter to the Commission dated June 19, 1962, it is our opinion that the Commission has jurisdiction over the discharge of untreated laundry wastes from the proposed laundromat installation by Charles H. Hamilton, Sr., in Havre de Grace.

In reaching its decision, the Commission should determine whether the expected discharge will cause pollution in the waters of the State under the jurisdiction of the Commission in the vicinity of Havre de Grace. The Commission should be guided by the standards set forth in Regulation IV of the Commission's Regulations.

I am returning herewith the Request for Certificate of Approval and the copy of your letter to Mr. Hamilton.

Very truly yours,

Loring E. Hawes
Assistant Attorney General

(Letter to Paul McKee)

July 31, 1961

Mr. Paul W. McKee, Director
Water Pollution Control Commission
State Office Building
Annapolis, Maryland

Dear Mr. McKee:

Receipt is acknowledged of your recent letter in which you inquire whether your Commission is legally authorized to promulgate regulations for control of silt discharged into the waters of the State resulting from storm water runoff over land areas that are exposed from land clearing or development operations.

Powers and duties of the Water Pollution Control Commission are set forth in Sections 34-45 of Article 66C of the Annotated Code of Maryland (1957 Edition and 1960 Supplement). Section 39 provides:

> It shall be unlawful for any person to discharge or permit to be discharged directly or indirectly into any waters of this State any waste or polluting substances of any kind as defined for the purpose of this subheading in violation of any duly authorized rule, regulation or order of the Commission. Any person who shall so discharge or permit to be discharged directly or indirectly any waste or polluting substances into any of the waters of the State which will cause pollution as defined herein shall be deemed to violate the provisions of this subheading.

The term "pollution" is defined in Section 34 to mean:

> ...the discharge or deposit into any of the waters of this State of any liquid, gaseous or solid substance or substances which may create a nuisance therein or render such waters unclean or noxious so as to be detrimental to the propagation, cultivation or conservation of animals, fish or aquatic life, or unsuitable with reasonable treatment, for use as present or possible future source of public water supply or unsuitable for commercial, industrial, agricultural, recreational or other reasonable uses.

It is my understanding that the silt discharge to which you refer is detrimental to fish and aquatic life and additionally renders the waters unsuitable inter alia for recreational and other reasonable uses. In other words, the discharge into the waters of the State of the silt in the manner above mentioned constitutes "pollution" as defined in Section 34.

The Commission is authorized by Section 36 to issue special orders directing any person in this State causing the pollution of the State's waters to secure within the time specified therein, such operating results as are practicable of attainment toward the reduction, control, abatement and prevention of such pollution. The Section further provides:

> If such results are not secured within the specified time, the Commission shall further direct such person to build or install and use within a reasonable specified time such designated systems, treatment plant structures, devices or means as are practicable and available for controlling, abating and preventing such pollution and to modify, amend or cancel any such special order or orders.

The Commission, by Section 36(d), is vested with authority to promulgate rules and regulations as "...shall from time to time be deemed necessary to carry out the provisions of this subheading."

Section 36(c) empowers the Commission "...to establish such reasonable water quality standards or criteria for any of the waters of the State, keeping in mind the public use to which they are or may be put, as may be deemed necessary for the purpose of this subtitle...."

It is my opinion, in light of the above, that land developers who unreasonably, through lack of diligence in conducting their operations or from other like inactivity, create and permit to exist conditions conducive to silt discharge into the waters of the State through storm water runoff, are subject to control by your Commission; that where existing water quality standards are thereby violated, your Commission is authorized to issue special orders upon such developers to compel compliance with the established standards; and that should special requirements be indicated as reasonably necessary to control pollution resulting from land development operations, your Commission may promulgate reasonably regulations defining and establishing such requirements. In this connection, however, your attention is drawn to the pertinent provisions of the law relating to hearings and notice to affected persons prior to issuance of orders and adoption of regulations.

Very truly yours,

Robert C. Murphy
Assistant Attorney General

(Letter to Paul McKee)

September 19, 1962

Mr. Paul W. McKee, Director
Water Pollution Control Commission
State Office Building
Annapolis, Maryland

Re: (1) Regulation IV, Supplement 1, Detergent wastes
(2) Regulation IV, Supplement 2, Toxic materials
(3) Control of sale of Detergent Materials

Dear Mr. McKee:

We have received proposed Supplements 1 and 2 to Regulation IV relating to detergent waste and toxic materials, respectively, and have found these proposed regulations to be legally sufficient as to form and substance. We would, however, suggest that the following changes of wording be made for further clarification:

(a) Supplement 2, paragraph IV, 4, page 6, add the word "adversely" so that this paragraph reads: "The toxic materials...so as not to adversely affect desirable species of aquatic life..."
(b) In Supplement 2, paragraph IV, 5, and V 1, substitute the word "shall" for the verb "must."
(c) Supplement 2, paragraph V, 2, should read as follows: "The application for a permit shall include the following information for every project:"

As we discussed at our last meeting, these Regulations should be published in a newspaper of general circulation in the geographic area to be affected by the Regulations at least thirty days prior to final approval by the Commission. (See Article 66C, Section 36 (d), Annotated Code of Maryland)

At our recent conference you requested our opinion as to whether the Water Pollution Control Commission may regulate and prohibit the sale of certain detergent materials in the State of Maryland. It is our opinion that such action would be beyond the scope of the powers of the Water Pollution Control Commission and that the control of such sales may only be accomplished through legislative action in the manner that sales of poisonous substances are prohibited except under certain clearly defined circumstances. (See Article 43, Sections 274 through 283.)

It is for the Legislature to determine whether the extension of the State's police power into this controversial area is justified. The present function of the Water Pollution Control Commission is to regulate the use of substances causing pollution to the waters of this State. Such powers do not extend to the sale of the substances involved.

Very truly yours,

Loring E. Hawes
Assistant Attorney General

Volume 47, Page 131

December 13, 1962

Dr. Joseph T. Singewald, Jr., Director
Department of Geology, Mines and Water Resources

In your letter of November 23, 1962, you requested our opinion as to whether the Department of Geology, Mines and Water Resources is authorized to require a permit for the appropriation or use of water from a tidal estuary of the Chesapeake Bay within the boundaries of the State of Maryland. The authority vested in that Department to regulate the appropriation and use of any waters of this State is set forth in Section 720 of Article 66C, Annotated Code of Maryland (1957 Ed.), which section provides as follows:

> From and after January 1, 1934, it shall be unlawful for the State or any agency thereof, any person or persons, partnership, association, private or public corporation, county, municipality,

or other political subdivision of the State to appropriate any waters of the State, surface or underground, without the consent or permit of the Department of Geology, Mines and Water Resources. Nothing in this section shall be construed to apply to the use of water for domestic and farming purposes or for the use of water for an approved water supply of any municipality; nor shall it apply to any particular use in existence on January 1, 1934, provided such use is not thereafter abandoned.

Sections 724 and 725 of Article 66C provide for issuance of permits, notice, public hearing and other related matters of administrative procedure. The above cited sections of the Water Resources Act, insofar as they pertain to the appropriation or use of the waters of the State, are not limited to the non-tidal waters exclusively.

In Section 721 of the same Article, the legislature specifically exempted the tidal waters from the authority vested in the Department of Geology, Mines and Water Resources to control and regulate the construction or repair of dams, reservoirs, structures and waterway obstructions. The pertinent parts of this section are as follows:

721 (a) Permit required....it shall be unlawful for the State or any agency thereof, any person..., to construct, reconstruct or repair any reservoir, dam or waterway obstruction; or to make or construct, or permit to be made or constructed, any change therein or addition thereto, or to make, or permit to be made, any change in, addition to, or repair of any existing waterway obstruction; or in any manner to change or diminish the course, current, or cross-section of any stream or body of water, wholly or partly within this State, except the tidal waters, without a permit from the Department of Geology, Mines and Water Resources, in writing, previously obtained, upon written application therefor to said Department.

In construing the Water Resources Law, of which the above-cited sections are a part, we find that certain principles of statutory construction are applicable. The cardinal rule of construction of statutes is to ascertain the intention of the Legislature, which must be sought first in the language of the Act itself. If a word used in the statute is susceptible of two or more interpretations, consideration should be given to the object to be accomplished by the legislation; and the meaning which will best harmonize with the general scheme of the statute should be adopted. Powell v. State, 179 Md. 399; Bouse v. Hutzler, 180 Md. 682. A statute should be construed to effectuate the intention of the Legislature and it should be interpreted according to the ordinary and natural import of its language, unless a different meaning is clearly indicated by the context, without resorting to subtle or forced interpretation for the purpose of extending or limiting its operation. State Tax Commission v. Potomac Electric Power Co., 182 Md. 111. As a further aid in interpretation of a statute, the preamble or recital of legislative policy may be referred to, although the preamble is not an operative part of the legislation. National Can Corp. v. State Tax Com., 220 Md. 418, Appeal dismissed, 80 S. Ct. 586, 361, U. S. 534, 4 L. Ed. 2d 538; Hammond v. Frankfeld, 194 Md. 487.

Taking these principles into consideration and viewing the statute as a whole, it is clear that the Legislature intended that the Department should have two primary functions in the regulation of water resources. The first of these functions, as expressed in Section 720, is the regulation of the appropriation and use of all the waters of the State. The second function, as expressed in Section 721, is the regulation and control over the erection or repair of dams, structures and waterway obstructions in the non-tidal waters of the State. The latter function, as it

affects navigable bodies of water, was, at the time of the enactment of this legislation, already subject to Federal regulation. The United States Corps of Engineers, pursuant to 33 U. S. C. A. 401, exercises a measure of control over dams, bridges and other possible obstructions in navigable waterways. Since tidal waters are generally navigable, it is not unreasonable to assume that the Legislature did not intend to extend State regulatory authority into that area already occupied by the Federal authorities. On the other hand, the erection of dams and waterway obstructions in non-navigable bodies of water was unregulated prior to the enactment of this legislation and did affect the course and supply of water as a natural resource.

A statute should be construed with a view to, and so as to best answer, its maker's original intention, which may be determined from the cause or necessity for passing the act or from other contemporary circumstances. Barnes v. State, 186 Md. 287; Unemployment Compensation Board v. Albrecht, 183 Md. 87.

That the Legislature intended a dichotomy of functions as outlined above is further supported by the preamble to the original act, wherein it was stated:

> AN ACT to declare the policy of the State to control, so far as practicable, the appropriation or use of surface and underground waters of the State; to control the construction, reconstruction and repair of reservoirs, dams and waterway obstructions in any of the waters of the State; to create the Water Resources Commission;....

1933 Laws of Maryland, Chapter 526. See also Section 718, Article 66C. Finally the words of the statute itself in Section 720, i.e., "the appropriation or use of any of the waters of the State, surface or underground," when according to their natural and ordinary meaning, clearly infer that no waters within the boundaries of the State are excluded from the scope of the statute. Although "surface water" may, with regard to rights of property ownership, have a restrictive common law definition, (Sainato v Potter, 222 Md. 263), such would not be the ordinary meaning of the term. There is no reason for such a strained construction when the statute is read as a whole. Surface water, as used here, merely means all water having an exposed surface as distinguished from that which lies beneath the surface of the ground in underground pools, streams and strata. In another statute relating to the conservation of water as a natural resource, the Legislature specifically defined "waters of this State" as being:

> ...both surface and underground waters within the boundaries of this State or subject to its jurisdiction including that portion of the Atlantic Ocean and its tributaries within the State of Maryland, the Chesapeake Bay and its estuaries and all ponds, lakes, rivers and streams.... Section 34, Article 66C.

It is an established rule of statutory construction that statutes relating to the same subject matter; i. e., in pari materia, should be considered together so that they will harmonize with each other and be consistent with their general object and scope, even though they contain no reference to one another and were passed at different times. Smith v. Higinbotham, 187 Md. 115; Pressman v. Elgin, 187 Md. 446. This office has previously ruled that the Water Resources Act and the Water Pollution Control Act (Article 66C, Sections 34-45) are in pari materia. 44 opinions of the Attorney General 177, 178.

For the foregoing reasons, we conclude that the Department of Geology, Mines and Water Resources is authorized to require a permit for the use or appropriation of tidal waters within the boundaries of this State.

Thomas B. Finan, Attorney General
Loring E. Hawes, Asst. Atty. General

(Letter to Dr. Weaver)

June 4, 1964

Dr. Kenneth N. Weaver, Director
Maryland Geological Survey
102 Latrobe Hall, The Johns Hopkins University
Baltimore, Maryland 21218

Dear Dr. Weaver:

Your recent letter asked what changes, if any, were affected in the duties and responsibilities of your Department, now the Maryland Geological Survey (formerly the Department of Geology, Mines and Water Resources), in connection with oil and gas regulation by Senate Bill No. 26, which became the law of the State on June 1, 1964.

Prior thereto, jurisdiction over the various natural resources of the State was spelled out in the Maryland Code (1957 Ed.), Article 66C, title "Natural Resources." This Article conferred upon the Department of Geology, Mines and Water Resources general supervisory powers over mining (Sections 718-755). Effective June 1, 1964, there is established a separate department for the planning, development and conservation of the State's water resources. In creating the new department, Senate Bill No. 26 has repealed certain sections of Article 66C, repealed and re-enacted other sections and recodified and renumbered still others. New Article 96A, title "Water Resources," has been added to the Maryland Code.

The new State Department of Water Resources, created by Senate Bill No. 26, has powers provided in 96A and also has the powers and duties of the Water Pollution Control Commission and those powers and duties of the Department of Geology, Mines and Water Resources which are transferred to the new Department of Water Resources in Article 96A.

Article 66C, Sections 735-754, inclusive, title "Water Resources", subheading "Well Drillers," was recodified by transfer to new Article 96A, and these sections were renumbered Sections 30-49, inclusively. Accordingly, jurisdiction over the area covered by this subheading now reposes in the new Department of Water Resources. However, in our view, the duties and responsibilities of your Department, Maryland Geological Survey, in the area of oil and gas regulation are not diminished. You have been divested by Article 96A only of so much of your jurisdiction as concerns water resources.

Provisions respecting the supervisory control of gas and oil remain an integral part of Article 66C. Sections 675-689 charge your Department with distinct responsibilities in this area. Section 677 prohibits the drilling of a well for gas and oil without first obtaining a permit from the Department under such reasonable terms and conditions and on such forms as the Department shall prescribe. We held wells for the storage as well as for the production of gas to be included in the permit and bond requirements of the statute. In so holding, we cited Article 66C, Section 753, defining a well to include any excavation for gas or oil. The recodification of said Section and its transfer to Article 96A does not lead us to a different conclusion. We think the regulation of gas storage wells by your Department equally as valid now as before recodification of Section 753. In any event, we believe that Section 677, requiring a permit from

your Department to drill "any well for gas or oil," is broad enough to cover the drilling of a gas storage well.

You have also asked whether a driller of multiple wells may "file a blanket bond for all drilling operations, rather than an individual bond for each well that may be drilled." Article 66C, Section 678, requires every permit holder, in order to drill for gas or oil, to post a performance bond in the amount of $2,500 with good and sufficient securities to idemnify the State of Maryland against any breach of the statute or the rules and regulations of the Department. It is clear that the bond requirement extends to each well drilled, but the statute does not specify that a separate bond be taken out for each well. In our view, there is compliance with the statute when each well to be drilled is clearly and distinctly covered by a bond in at least the statutory amount, without regard to whether the required coverage is by a single blanket bond or by a separate bond for each well.

Very truly yours,

Fred Oken, Assistant Attorney General

(Letter to Paul McKee)

March 26, 1965

Mr. Paul W. McKee, Director
Department of Water Resources
State Office Building
Annapolis, Maryland 21401

Dear Mr. McKee:

In your recent letter you requested our opinion as to whether a person who has applied for a permit to drill a well shall be required to obtain a permit to appropriate water where such appropriation is for a use in existence on January 1, 1934, and such use has been continual since that time. You have indicated that the above question arises when an industry in continued use since January 1, 1934, needs a well replaced where the original well, after many years of operation, suddenly fails.

According to Code, Article 96A, Section 38, a licensed well driller is prohibited from drilling a water well for any owner who is required to obtain a permit for the production and appropriation of water from the well under Section 11, Article 96A, until the owner shall have obtained such permit from the Department. Section 11 provides as follows:

> From and after January 1, 1934, it shall be unlawful for the State or any agency thereof, any person or persons, partnership, association, private or public corporation, county, municipality, or other political subdivision of the State to appropriate or use any waters of the State, surface or underground, without the consent or permit of the Department of Geology, Mines and Water Resources, in writing previously obtained, upon written application therefor to the Department. Nothing in this section shall be construed to apply to the use of water for domestic and farming purposes or to the use of water for an approved water supply of any municipality; nor shall it apply to any particular use in existence on January 1, 1934, provided such use is not thereafter abandoned.

We would construe Section 38 as requiring a permit under Section 11 as a prerequisite to drilling only where Section 11 clearly requires that such permit be obtained. In the case that you have outlined in your letter —that is, where the particular use was in existence on January 1, 1934, and has continued without abandonment ever since—there would be no require-

ment for a permit under Section 11; and, therefore, none would be required as a prerequisite to drilling. However, whether or not the industry has maintained the use continually since January 1, 1934, is a fact which must be determined by the Department from all evidence before it. If there be any doubt, we believe that the industry should be notified that it should apply for an appropriation permit, advertise for the same, and attend a hearing at which time the determination will be made with respect to continued use since January 1, 1934.

With respect to persons not otherwise exempt, for any use that came into being, or which has been extended, added to or abandoned and later resumed, subsequent to January 1, 1934, a permit for use and appropriation for waters is required as a prerequisite to drilling; and the industry shall be required to go through the full procedure of notice and hearing in accordance with the provisions of the Water Resources Law.

Very truly yours,

Loring E. Hawes, Assistant Attorney General

(Letter to Roy E. Walsh)

April 1, 1966

Mr. Roy E. Walsh, Chairman
Board of Natural Resources
State Office Building
Annapolis, Maryland

Re: Agency Responsible for Abatement of Pollution by Acid Mine Drainage

Dear Mr. Walsh:

At its regular meeting on March 7, 1966, the Board of Natural Resources adopted the report of the Strip Mine and Land Reclamation Committee (a subcommittee of the Board of Natural Resources), in which report was included a request to the Attorney General to advise the Board as follows:

1. Which among landowner, lessee, operator, etc., is legally responsible to prevent pollution from active, inactive and completely mined sites.
2. Which among Maryland Geological Survey, Bureau of Mines and Department of Water Resources has the most effective powers for stopping pollution by acid mine drainage.

The magnitude of the acid mine drainage pollution problem is dramatically revealed in the Western Maryland Mine Drainage Survey recently published by the Department of Water Resources. This survey revealed that of 194 deep mines inspected, 56% of the active mines and 42% of the inactive mines were producing acid effluents. 48% of the total mine sites inspected (238 deep, 325 strip) were producing effluents which were measured for pH, total acidity, mineral acidity and iron. Of these mines, 79% were producing acid effluents contributing to poor or marginal water quality. 41% of the strip mines inspected were producing acid effluents. It is interesting to note that 64% of the strip mines producing acid effluents are considered to be backfilled in accordance with the requirements of the present Maryland Strip Mining Law (Article 66C, Sections 657-674). The prevention of acid mine pollution is further complicated by reason of the fact that many mine sites producing pollution have long since been abandoned.

Directing your attention to the second of the two questions referred to, it is our opinion that the Department of Water Resources has the most effective powers for preventing pollution by acid mine drainage. The Department of Water Resources, pursuant to Sections 23, 24, 25, Article 96A, is charged with the enforcement of all laws relating to the pollution of

the waters of the State of Maryland. The only exception set forth in Article 96A to the authority of this Department is limited to matters within the jurisdiction of the State Board of Health as set forth in Article 43. These matters pertain largely to sanitary sewage.

We have reviewed the sections of Article 66C relating to mining (Sections 486-674) and do not find that these portions of the law confer solely upon the Bureau of Mines the authority to enforce water pollution laws. In Section 492, Article 66C, it states that the Bureau of Mines shall "supervise the execution and enforcement of all laws enacted for the health and safety of persons and protection and conservation of property within, about, or in connection with bituminous coal mines or strippings in this State,..." We do not construe this provision as conferring authority on the Bureau of Mines to attempt to control pollution. As evidenced by other sections of the mining laws, the Bureau of Mines is primarily concerned with the health and safety of miners. Except for the supervision of backfilling strip mining operations, the Bureau has not been conferred any specific statutory means of abating mine pollution, nor does it appear that the Bureau has ever undertaken such function since its establishment pursuant to Chapter 307, Laws of 1922. On the other hand, the Department of Water Resources as successor to the Water Pollution Control Commission in matters of enforcement, has the specific authority and duty to investigate, conduct hearings, issue orders, take Court or administrative action, and do all other things necessary to control, abate and prevent the pollution of waters of the State by any persons, as defined in the Water Resources Law.

The person against whom the water pollution laws shall be enforced presents a difficult and complex problem in the mining areas in the State because the sites of pollution may be active mines, inactive mines, or completely mined sites. In some cases the person who actually produced the pollution-causing condition may have abandoned the site many years before, gone out of business, or left the State.

The enforcement problems that you have inquired about in your first question must be determined on a case-by-case basis. The pollution abatement laws provide for enforcement action against the person causing or permitting the pollution. For example, Article 96A, Section 25, states in part "Any person who shall so discharge or permit to be discharged directly or indirectly any waste or polluting substance into any waters of this State which will cause pollution as defined herein shall be deemed to violate the provisions of this subtitle." In the case of an active mine the enforcement action would normally be brought against the person conducting the mining operation. However, it is quite possible that the landowner of an abandoned mine site could be considered to be in violation of the provisions of the law if the mine site was causing acid pollution by reason of the failure of the landowner to prevent it. Likewise, a landowner who permits a lessee, licensee, employee or other person to conduct an activity on the land which causes pollution could be found to be in violation of the statute. While enforcement may seem harsh in some instances where the landowner has failed to protect himself by contract with the party causing the pollution, nevertheless, the purpose of the water pollution law is to prevent the pollution of Maryland waters with the ultimate objective of producing clean water throughout the State.

Very truly yours,

Loring E. Hawes
Assistant Attorney General